No. 10-1152

In the Supreme Court of the United States

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Petitioner,

v.

OAKLAND COUNTY MEDICAL EXAMINER AND OAKLAND COUNTY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Michigan

BRIEF IN OPPOSITION

KEITH J. LERMINIAUX, ESQ.
CO-COUNSEL
OAKLAND COUNTY MICHIGAN
DEPARTMENT OF CORPORATION
COUNSEL
1200 N. TELEGRAPH ROAD
DEPT. 419
PONTIAC, MI 48341-0419
(248) 858-0557

WILLIAM H. HORTON, ESQ.
Counsel of Record
GIARMARCO, MULLINS & HORTON, P.C.
101 WEST BIG BEAVER ROAD
10TH FLOOR
TROY, MI 48084-5280
(248) 457-7000
(248) 457-7001
bhorton@gmhlaw.com

Counsel for Respondents

April 15, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Table of Authorities ii

I. Introduction 1

II. Summary of Proceedings Below 2

III. Argument 6

The Michigan Supreme Court's Decision Does Not Involve Federal Issues 6

IV. Conclusion 13

Appendix:

Appendix A: United States Supreme Court, letter of March 29, 2010 . . . . 1b

Appendix B: United States District Court, Order dated March 24, 2011 . 3b

TABLE OF AUTHORITIES

Cases

Arizonans for Official English v. Arizona,
520 U.S. 43, 137 L. Ed. 2d. 170, 117 S. Ct. 1055
(1997) 7

Bowen v. Foltz,
763 F.2d 191 (6th Cir. 1985) 11

Brotherton v. Cleveland,
923 F.2d 477 (6th Cir. 1991) 3

Erie R.R. Co. v. Thompkins,
304 U.S. 64 (1938) 8

Great Northern Railways Co. v. Sunburst Oil & Refining Co.,
287 U.S. 358 (1932) 10, 11

Huddleston v. Dwyer,
322 U.S. 232 (1944) 8

Hyde v. University of Michigan,
426 Mich. 223 (1986) 9

Kuhn v. Fairmont Coal Co.,
215 U.S. 349 (1910) 8

McDonald v. Farm Bureau Ins. Co.,
480 Mich. 191 (2008) 9

Pohutski v. City of Allen Park,
465 Mich. 675 (2002) 9

Town of Castlerock v. Gonzales,
545 U.S. 748, 162 L. Ed. 2d. 658, 125 S. Ct. 2796 (2005) 7

West v. American Telephone & Telegraph,
311 U.S. 223 (1944) 7, 8

Whaley v. County of Tuscola,
58 F.3d 1111 (6th Cir. 1995) 3, 4, 8, 9

Constitutional Provisions

U.S. Const. amend. X 8

U.S. Const. art. I, § 8 8

Statutes

28 U.S.C. §1257 6

42 U.S.C. §1983 . . . . . 2, 3

MCL 52.201c 9

MCL 52.205 . . . . . 5, 9

Act No. 108, 2010 Mich. Pub. Acts (effective July 1, 2010) 11

Rules

Sup. Ct. R. 10 12

I.

INTRODUCTION

This Court should deny Petitioner's petition for the second time. There is no federal issue. The Sixth Circuit properly deferred to the Michigan Supreme Court to determine Michigan law through a certified question. The Michigan Supreme Court agreed to answer the certified question and determined that Petitioner has no property right under Michigan law in the brain of her deceased mother which was properly removed during a lawful autopsy. This was purely a question of state law.

Petitioner's argument that these proceedings somehow "overrule the law of the Sixth Circuit," Petitioner's brief at 19, ignores what was said and done by both the Sixth Circuit and the Michigan Supreme Court. The Sixth Circuit determined that Michigan law was "at best equivocal," Petitioner's Appendix B at 28a, and ordered that the question of Michigan law be certified to the Michigan Supreme Court. Petitioner's additional argument that this case "violates the fundamental principles of federalism," Petitioner's brief at 19, attempts to stand federalism on its head. Finally, Petitioner's suggestion is simply absurd that there is a constitutional right to the return of organs properly removed in a lawful autopsy conducted by a state to determine whether a crime had been committed.

II.

SUMMARY OF PROCEEDINGS BELOW

Petitioner's mother was injured after a fall in a nursing home. Petitioner suspected her mother had been abused or neglected at the nursing home. She contacted the police. The police opened a criminal investigation. A few days later, her mother died. The police reported the death to the Oakland County Medical Examiner, the office charged under state law to conduct an autopsy when a crime may have been committed. Petitioner's Appendix B at 11a.

The medical examiner took charge of the decedent and performed an autopsy. Among other things, her brain was removed to be examined (the decedent's primary injury was caused by a fall on her head). Examination of the brain required it to be hardened in a formaldehyde solution for 10 to 14 days. In the meantime, the decedent's body was returned to Petitioner, who cremated it. After the medical examiner completed his examination of the decedent's brain, it was incinerated. *Id.* at 11a-12a.

Petitioner claimed she had a property right in her mother's brain and that Oakland County and its medical examiner deprived her of that right under color of state law by destroying the brain, in violation of 42 U.S.C. §1983. A motion to dismiss and for summary judgment was denied. Petitioner's Appendix D at 59a.

Since qualified immunity was at issue, the medical examiner appealed and the Sixth Circuit agreed to also hear the appeal of Oakland County. The Sixth Circuit

held the medical examiner was immune because there was no clearly established right under Michigan law that the next-of-kin was entitled to body parts properly removed during a lawful autopsy. Petitioner's Appendix B at 17a-29a. The Sixth Circuit held that the facts in this case distinguished it from any existing federal cases:

> *Brotherton* [*v. Cleveland*, 923 F.2d 477 (6th Cir. 1991)] and *Whaley* [*v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995)], however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever.

Petitioner's Appendix B at 21a.

In *Brotherton*, the plaintiff filed a §1983 claim because the coroner removed her husband's corneas during an autopsy after she had specifically refused to allow this to be done. The removal of the corneas was unrelated to the investigative purpose of the autopsy. The Sixth Circuit held that Ohio law gave the plaintiff sufficient rights to create a legitimate claim to entitlement to the return of her husband's corneas. *Brotherton* did not concern, analyze or apply Michigan law in any respect.

Whaley did. *Whaley* arose after it was discovered that the assistant to a pathologist removed the corneas and sometimes the eyeballs of corpses after an autopsy was finished and then sold them for a profit, without

the knowledge or the consent of the next-of-kin of the decedent. The removal of the corneas and eyeballs was unrelated to the investigative purpose of the autopsy. As the Sixth Circuit stated, "The interesting question raised in this consolidated appeal is what relief the Constitution might provide when a state actor steals the eyes of a dead man." 58 F.3d. at 1112-13. Relying primarily on its interpretation of two 19th century decisions of the Michigan Supreme Court, the Sixth Circuit held that under Michigan law the next-of-kin have a right to possess the body for burial and prevent its mutilation. *Id.* at 1115.

In this case, the Sixth Circuit distinguished *Whaley* and determined that no Michigan decision had considered the situation presented here:

> None of these cases consider the situation where body parts were removed and retained during an autopsy for study in the course of a properly authorized criminal investigation.
>
> ***
>
> In sum, Michigan law regarding the rights of the next of kin in their relative's body parts removed for forensic examination during an autopsy is at best equivocal.

Petitioner's Appendix B at 27a, 28a.

The Court questioned whether any right existed under Michigan law to the return of a brain which was removed and examined as part of a criminal investigation during a properly authorized autopsy. Noting that *Whaley* did not involve the Michigan

Medical Examiner statute (MCL 52.205) and that no federal or Michigan case involved the failure to return a body part which had been removed pursuant to a valid investigative reason during an autopsy, the Court found Petitioner's due process claim turned on the answer to this unsettled question of state law. Petitioner's Appendix B at 30a. Accordingly, the Sixth Circuit directed the District Court to certify the question to the Michigan Supreme Court for resolution. The District Court certified the question to the Michigan Supreme Court.[1]

The Michigan Supreme Court accepted the question, ordered the filing of briefs, held oral argument and issued an opinion. The question posed to the Michigan Supreme Court was:

> Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?

The Court answered:

> No, assuming that a decedent's brain was removed by a medical examiner to conduct a lawful investigation into the decedent's cause of

---

[1] Petitioner's motion for rehearing in the Sixth Circuit (Petitioner's Appendix F) and for certiorari to this Court were denied (United States Supreme Court letter of March 29, 2010, Appendix A).

> death, the decedent's next of kin does not have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination.

As a result, Defendants filed a motion for summary judgment, which the District Court granted. (Order of U.S. District Court dated March 24, 2011, Appendix B).

III.

ARGUMENT

THE MICHIGAN SUPREME COURT'S DECISION DOES NOT INVOLVE FEDERAL ISSUES

The jurisdiction of this Court to grant a writ of certiorari from a state court ruling is limited to questions involving federal statutes or the Constitution. 28 U.S.C. §1257. The answer to the certified question by the Michigan Supreme Court does not involve either.

The Michigan Supreme Court was requested to answer whether, under Michigan law, a decedent's next-of-kin has a right to possess the decedent's brain which was removed by a medical examiner during a lawful autopsy after the medical examiner has completed the examination. The Michigan Supreme Court answered that no such right exists under Michigan law.

The Michigan Supreme Court is the "final arbiter" of Michigan law. *West v. American Telephone & Telegraph*, 311 U.S. 223, 236 (1944) ("the highest court of the state is the final arbiter of what is state law"). Absent extraordinary circumstances not present here, the federal courts are not at liberty to contradict the Michigan Supreme Court. *Id.* ("when it has spoken, its pronouncement is to be accepted by federal courts as defining state law"). Whether state law rights are of constitutional dimension may be a question for the federal courts, but the foundational decision is Michigan's. *Town of Castlerock v. Gonzales*, 545 U.S. 748, 757, 162 L. Ed. 2d. 658, 125 S. Ct. 2796 (2005).

Petitioner's argument that the Sixth Circuit "invited" the Michigan Supreme Court to overrule *Whaley* is unsupported. Rather, the Sixth Circuit properly concluded that Michigan law on this issue was "at best equivocal" and simply heeded this Court's admonition in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48, 137 L. Ed. 2d. 170, 117 S. Ct. 1055 (1997) that "[f]ederal courts lack competence to rule definitively on the meaning of state legislation" and to certify such questions to state courts:

> Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response....

Id. at 76-77.

Petitioner's argument that this process violates the concept of federalism stands federalism on its head.

The federal government is one of delegated and enumerated authority. E.g., Constitution, Article I, Section 8. Authority which is not delegated and enumerated is reserved to the states or to the people. Constitution, Amendment 10. The federal government has no authority to regulate the practice of medical examiners in Michigan and Petitioner offers no legal authority for the contrary position.

Instead, Petitioner cites to various cases of this Court which, according to Petitioner, stand for the proposition that federal courts generally are to determine state law. Obviously, those cases say no such thing or predate *Erie R.R. Co. v. Thompkins*, 304 U.S. 64 (1938). Petitioner's citation to *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910), a diversity case, ignores that *Erie* was decided 28 years later. Petitioner also cites *West v. American Telephone & Telegraph*, 311 U.S. 223 (1940). In *West*, this Court reversed the Sixth Circuit's disagreement with Ohio courts on the meaning of Ohio law on the basis of *Erie*. Interestingly, Petitioner also cites *Huddleston v. Dwyer*, 322 U.S. 232 (1944) where this Court stated that the federal courts have a duty to determine the state law as pronounced by state courts and not to impose their own meaning of state law where the state court has spoken.

Petitioner's argument that *Whaley* is binding here and was ignored is misplaced. First, as indicated above, the Michigan Supreme Court -- asked to decide a question of state law -- did not address *Whaley* nor should it have. As the Michigan Supreme Court stated, it decided the certified question on the basis of the Michigan medical examiner statute and Michigan common law.

Second, *Whaley*, as the Sixth Circuit explained, is significantly different and does not answer the question in this case. *Whaley* involved the unlawful removal and sale of corneas and eyeballs to an eyebank following an autopsy. The corneas and eyeballs were not removed for any investigative purpose. The sale of the tissue and organs was not justified in any way. Here, the brain was removed for a legitimate investigative purpose and, as the Michigan Supreme Court stated, disposed of pursuant to "an historical practice of retaining, examining, and later disposing of an examined brain when MCL 52.205 [the medical examiner statute] was enacted in 1953 and that medical examiners promulgated rules to permit this practice under MCL 52.201c." Petitioner's Appendix A at 4a.

Petitioner's argument that the answer of the Michigan Supreme Court to the certified question can only be applied prospectively is wrong and invokes no federal question. First, the answer to the certified question did not "change its interpretation and application of state law." Petitioner's Brief at 24. Rather, it answered a previously unanswered question. Second, Michigan law is clear that its judicial decisions are retroactive. Under Michigan law, "judicial decisions are given full retroactive effect." *Pohutski v. City of Allen Park*, 465 Mich. 675, 696 (2002). *Accord*: *Hyde v. University of Michigan*, 426 Mich. 223, 240 (1986) ("judicial decisions are to be given complete retroactive effect"); *McDonald v. Farm Bureau Ins. Co.*, 480 Mich. 191, 205 (2008) ("our decisions are given full retroactive effect").

Federal courts may not decide whether state court decisions are retroactive or prospective, but instead

must accept the state's rules. Justice Cardozo put that issue to rest in *Great Northern Railways Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). In that case, Montana had refused to make retroactive a change in its law. The petitioner claimed, as does the Petitioner in this case, that such a decision involves the federal Constitution. This Court held that Montana was free to do as it saw fit on this issue:

> This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal. We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relations backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.... [W]e are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force

> of precedent or of the meaning of the judicial process.

Id. at 364-66 (citations omitted, emphasis added). *See Bowen v. Foltz*, 763 F.2d 191, 192-94 (6th Cir. 1985) (holding that, pursuant to *Great Northern Railway*, whether to apply a change in Michigan law retroactively or prospectively does not raise a federal question).

Petitioner's Hail Mary argument is that this Court should declare a constitutional right to the return of properly removed organs. Petitioner does not even attempt to build any kind of legal framework from where such a right would spring. The Constitution does not delegate to the federal government a general police power. Such power is retained by the states. Under what circumstances an autopsy is to be performed to determine whether a crime has been committed within Michigan's borders and what to do with body parts obtained during that autopsy go to the essence of Michigan's sovereignty and police power. It is most properly suited for legislative determination. If there is any argument regarding federalism in this case, it is on behalf of Defendants that there is no lawful authority for the federal government to intrude in this area.[2]

Finally, this Court should deny the writ for the very practical reason that this Petition is probably not the last one in this case. The rules of this Court state that "[a] petition for a writ of certiorari will be granted

---

[2] The Michigan Legislature has enacted a statute governing this subject matter, effective July 1, 2010. Michigan Public Act 108 of 2010.

only for compelling reasons." Sup. Ct. R. 10. Following the answer to the certified question, the District Court granted Defendants' motion for summary judgment. It is likely Petitioner will file an appeal to the Sixth Circuit, where all of these arguments are likely to be made again. If the Sixth Circuit disappoints Petitioner yet again, she will have the right to file yet another Petition with this Court and this Court will have the benefit of the analysis of these issues by the Sixth Circuit. There is no good reason to grant the writ at any time and certainly no compelling reason to do so now.

IV.

CONCLUSION

Michigan is the final arbiter of Michigan law. There is no federal constitutional issue is this case. Her Petition should be denied and Respondents should be awarded their costs.

Respectfully submitted,

WILLIAM H. HORTON, ESQ.
Counsel of Record
GIARMARCO, MULLINS & HORTON, P.C.
101 WEST BIG BEAVER ROAD, 10TH FLOOR
TROY, MI 48084-5280
(248) 457-7000
(248) 457-7001
bhorton@gmhlaw.com

KEITH J. LERMINIAUX, ESQ.
CO-COUNSEL
OAKLAND COUNTY MICHIGAN
DEPARTMENT OF CORPORATION COUNSEL
1200 N. TELEGRAPH ROAD, DEPT. 419
PONTIAC, MI 48341-0419
(248) 858-0557

Attorneys for Respondents

April 15, 2011

APPENDIX

TABLE OF CONTENTS

Appendix A: United States Supreme Court, letter of March 29, 2010 . . . . . 1b

Appendix B: United States District Court, Order dated March 24, 2011 . . . 3b

APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 29, 2010

Mr. William H. Horton
Giamarco Mullins & Horton PC
101 W. Big Beaver Road
10th Floor
Troy, MI 48084-5280

Re: Karen Waeschle
v. Ljubisa J. Dragovic, Individually and in His Official Capacity as Medical Examiner of Oakland County, Michigan, et al.
No. 09-879

Dr. Mr. Horton:

The Court today entered the following order in the above-entitled case:

The petition for writ of certiorari is denied.

Sincerely,
/s/ William K. Suter
William K. Suter, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No: 08-10393

[Filed March 24, 2011]

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Plaintiff,

vs.

OAKLAND COUNTY MEDICAL EXAMINER, LJUBISA DRAGOVIC, M.D, ET AL,

Defendants.

Honorable Victoria A. Roberts

ORDER

1. BACKGROUND

The facts of this case were set forth in an earlier decision of this Court (08-10393), and in *Waeschle v Dragovic*, 576 F. 3d 539, 542 (6th Cir. 2009).

The Sixth Circuit reversed an earlier judgment of this Court which denied summary judgment to Oakland County. The Sixth Circuit also remanded the case, with the instruction that this Court certify a question to the Michigan Supreme Court, and conduct further proceedings as are necessary for the proper disposition of the case.

In its Opinion, the Sixth Circuit held that the merits of Waeschle's constitutional claim depend primarily on whether, under Michigan law, Waeschle had a property interest in her deceased mother's brain. The Sixth Circuit cited to *Women's Med. Prof'l Corp. v Baird*, 438 F.3d 595, 611 (6th Cir. 2006) (explaining that the question of whether a constitutionally protected property interest exists is often a question of state law). Specifically, the Sixth Circuit said that Waeschle's federal due process claim turns on the answer to the following state-law question; it is this question which the Sixth Circuit directed this Court to certify to the Michigan Supreme Court:

> Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?

The Michigan Supreme Court answered the question:

> No, assuming that a decedent's brain was removed by a medical examiner to conduct a lawful investigation into the decedent's death,

> the decedent's next of kin does not have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination.

The Sixth Circuit went on to explain its decision. It stated that the Michigan governing statute only required prompt return of "the body," that it permitted the medical examiner to retain portions of the body for crime detection purposes, and accordingly, there was no clear right under then existing law for next of kin to have a brain lawfully removed and retained for forensic examination, returned to them. *Waeschle v. Dragovic*, 576 F.3d 539, 549-50 (6th Cir. 2009). That Michigan governing statute says:

> The county medical examiner shall, after any required examination or autopsy, promptly deliver or return the body to relatives . . . except that the medical examiner may retain, as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime. MCLA 52.205(S)(5)

The Sixth Circuit concluded its Opinion by stating that no Michigan case law gives next of kin a possessory right to a decedent's brain following a lawful forensic examination. *Waeschle, supra* at 550.

Following this ruling, Defendant Oakland County filed a Motion for Summary Judgment here, asking the Court to rule that there is no genuine issue of material fact that the autopsy performed on Karen Waeschle's

mother was lawful, and that Defendant is entitled to judgment as a matter of law.

Plaintiff opposes the motion. She says that the remaining issue in this case is not whether the autopsy was lawful; the issue is whether the taking and retention of the body parts without return after the autopsy concluded, was lawful. Plaintiff's position is that while the State is fully allowed to perform an autopsy for the purpose of determining the cause of death, there are limits to that jurisdiction. Plaintiffs say that State jurisdiction ends once the body parts are no longer needed by the State. Plaintiff contends that once the cause of death is pronounced, the state must return the body parts to next of kin.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." In reviewing a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

The movant has the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant meets this burden, the nonmoving party must, by affidavit or otherwise as provided by Rule 56, "set out specific facts showing a genuine issue for trial."

Fed. R. Civ. P. 56(e)(2). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The essential inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. If the nonmoving party does not respond with specific facts showing a genuine issue for trial, summary judgment is appropriate. *Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989).

III. ANALYSIS

The Court agrees with the analysis set forth by Defendant Oakland County in its Brief, and believes that the Michigan Supreme Court effectively made a decision on the merits of Waeschle's federal constitutional claim when it held that she has no property interest in her deceased mother's brain under Michigan law.

The Michigan Supreme Court said two things fatal to Plaintiff's cause of action: (1) If the autopsy was lawful, and the brain was removed for crime detection purposes, the next of kin have no possessory interest in the brain once the body is returned to the next of kin; and (2) there is no state case law which grants the next of kin a possessory interest in body parts -- distinguished from the body -- following a forensic examination. *In re: Certified Question (Waeschel v. Oakland Co. Med. Examiner)*, 488 Mich 1, 3-4 (2010).

The upshot of this holding by the Michigan Supreme Court, is that there is no state property right on which Plaintiff can base her 42 U.S.C. §1983 claim.

III. CONCLUSION

Defendant is entitled to judgment.

Plaintiff's Motion to Reinstate Summary Judgment Order For A Limited Class is **MOOT**.

IT IS ORDERED.

/s/ Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: March 24, 2011

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on March 24, 2011.

s/Linda Vertriest
Deputy Clerk